

On appeal, appellant generally asserts that the evidence submitted with his reconsideration request was sufficient to establish that his claim for employment-related hearing loss was timely filed.

FACTUAL HISTORY

This case has previously been before the Board.³ By decision dated May 5, 2006, the Board found that appellant's claim was barred by the applicable time limitation provisions of FECA.⁴ On October 20, 2006 the Board denied his petition for reconsideration. Appellant thereafter requested reconsideration with OWCP on a number of occasions and in merit decisions dated August 4 and October 12, 2007, OWCP denied modification of the prior decisions. In decisions dated January 16 and April 17, 2008, OWCP denied his requests for reconsideration and in a merit decision dated November 4, 2008, it denied modification of the prior decisions. By order dated February 23, 2009, the Board dismissed an appeal docketed as 08-1573 on the grounds that appellant wished to pursue reconsideration before OWCP. In a September 17, 2009 decision, the Board again found that his claim was barred by the applicable time limitation provisions of FECA.⁵ On April 13, 2010 the Board denied appellant's petition for reconsideration. The law and facts of the previous Board decisions and orders are incorporated herein by reference.

On August 7, 2010 appellant again requested reconsideration and submitted a performance evaluation that covered the period May 14, 1992 to March 2, 1993. His supervisor stated: "[Appellant] may have a hearing disability; previous suggestions by supervisor personnel for him to have his hearing checked have been ignored." In a merit decision dated September 20, 2010, OWCP denied modification of the prior decisions. It noted that the record contained an audiogram dated July 29, 1992 that was reviewed by an OWCP medical adviser and did not show hearing loss due to federal employment, and that the supervisor's statement on the performance appraisal did not acknowledge an employment-related hearing loss.

On July 25, 2011 appellant requested reconsideration. He asserted that a preponderance of the evidence of record established that his supervisors reasonably should have known that his hearing loss was caused by noise exposure in his federal employment. In support of his contention that his claim was timely, appellant submitted additional performance appraisals that covered the periods October 24, 1987 to October 20, 1989, October 21, 1989 to March 6, 1991 and March 7, 1991 to May 13, 1992; copies of employing establishment policies regarding safety procedures and hearing conservation; a Code of Federal Regulations section on training of supervisors;⁶ and a copy of the Board case *Duet Brinson*.⁷

³ On January 26, 2004 appellant, then a 62-year-old former engineer who had retired on September 30, 1996, filed an occupational disease claim, alleging that noise exposure during his federal employment caused a hearing loss.

⁴ Docket No. 06-464 (issued May 5, 2006).

⁵ Docket No. 09-452 (issued September 17, 2009).

⁶ 20 C.F.R. § 1960.55.

⁷ 51 ECAB 168 (2000).

In a nonmerit decision dated August 22, 2011, OWCP reviewed the history of the case, discussed the evidence and argument submitted with his July 25, 2011 reconsideration request, and found it immaterial, irrelevant, repetitious or cumulative and denied appellant's reconsideration request.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁸ Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁹ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated August 22, 2011 denying appellant's request for reconsideration. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's claim.¹²

With his July 25, 2011 reconsideration request, appellant asserted that a preponderance of the evidence of record established that his supervisors reasonably should have known that his hearing loss was caused by noise exposure in his federal employment. As noted in the Board's September 17, 2009 decision, he made a similar argument previously, contending at that time that the employing establishment had both constructive and actual notice of his hearing loss because its medical records disclosed an illness. The Board found that the record did not establish that the employing establishment had constructive notice, finding that it was not enough that the employing establishment knew appellant suffered from a hearing loss but also that his

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.608(a) (1999).

¹⁰ *Id.* at § 10.608(b)(1) and (2) (1999).

¹¹ *Id.* at § 10.608(b) (1999).

¹² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2007). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* C.F.R. § 501.3(e) (2008); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

supervisors knew or reasonably should have known that the condition was caused by noise exposure at work.¹³ In support of his current argument, appellant submitted performance appraisals covering the period October 24, 1987 to May 13, 1992, copies of employing establishment policies and federal regulations on training of supervisors and a copy of the Board's *Duet Brinson* decision.¹⁴

For actual knowledge of a supervisor to be regarded as timely filing, an employee must show not only that the immediate superior knew that he or she was injured, but also knew or reasonably should have known that it was an on-the-job injury.¹⁵ The instant case can be distinguished from *Brinson*, where the Board found appellant's claim for polychlorinated biphenyls exposure was timely filed. Here, as noted in the prior Board decisions, the employing establishment has conceded noise exposure but noted that when appellant was first employed on November 5, 1978 an audiogram was obtained that showed a hearing loss and that audiograms performed while he worked at the employing establishment did not show a significant threshold shift.¹⁶

The performance appraisals submitted with appellant's request for reconsideration do not mention a hearing loss and are therefore irrelevant. The policies and regulations are of a general nature and do not address the specific factual situation at issue in this case.¹⁷

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied his reconsideration request.¹⁸

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹³ *Supra* note 5.

¹⁴ *Supra* note 7.

¹⁵ 5 U.S.C. § 8122(b); *M.B.*, Docket No. 11-673 (issued January 10, 2012).

¹⁶ *Supra* notes 4 and 5.

¹⁷ *See generally* *Roger G. Payne*, 55 ECAB 535 (2004).

¹⁸ *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board